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[*Williams v. Public Service Electric & Gas Co.*, 94-ERA-2 \(Sec'y Apr. 10, 1995\)](#)
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DATE: April 10, 1995
CASE NO. 94-ERA-2

IN THE MATTER OF

BERT WILLIAMS,

COMPLAINANT,

v.

PUBLIC SERVICE ELECTRIC & GAS CO.,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

REMAND ORDER

In this case arising under the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), the parties entered into a settlement agreement (Agreement) that was approved by the Administrative Law Judge (ALJ) in a Recommended Decision and Order. I also approved the Agreement and dismissed the complaint. June 8, 1994 Final Order Approving Settlement and Dismissing Complaint.

One term of the Agreement provides that:
the Department of Labor shall retain jurisdiction of this matter for purposes of enforcement of this Agreement, and in the event that Respondent PSE&G [Public Service Electric & Gas Co.] materially breaches its obligations under this Agreement, Complainant shall have the right to reinstate his complaint with the Department of Labor at its present stage of development

or the right to seek enforcement of the Agreement

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through the Department of Labor.

Agreement, Sec. 2.

Acting pursuant to the quoted provision, Williams filed with the ALJ a Motion for Sanctions and to Enforce Settlement Agreement and Agency Order (Motion to Enforce). Noting that jurisdiction in this case had transferred to the Secretary, the ALJ found that he lacked jurisdiction to entertain the motion and dismissed it. January 25, 1995 Decision and Order Dismissing Claim.

Williams has asked me to remand this case to the ALJ for enforcement of the terms of the Agreement. In the alternative, he requests that I initiate or join an enforcement action in District Court. PSE&G opposes the requests. I will remand to the ALJ for further proceedings, as explained below.

THE ALLEGED BREACHES OF THE AGREEMENT

The first alleged breach concerns the annuity payment, which provides that "Mr. Williams will receive a retirement benefit based upon a single life annuity" in a specified amount. [1] Agreement Sec. 15. Rather than choosing a single life annuity, Williams opted to provide a survivor benefit for his wife. The parties agree on the amount of the resulting monthly benefit with survivor option. PSE&G is paying Williams only a portion of the agreed amount, however. PSE&G argues that the payment of a portion of the agreed amount is appropriate because of tax withholding requirements. Williams disagrees.

Williams also seeks an order requiring PSE&G to pay the attorney's fees he incurred in obtaining a portion of the back pay owed under the Agreement. Williams contends that it took more than seven months and the efforts of an attorney to obtain payment of approximately \$500 that PSE&G concedes it owed to him.

DISCUSSION

Both the ERA, 42 U.S.C. § 5251(d) (1988), and the implementing regulations, 29 C.F.R. § 24.8 (1994), provide that the Secretary or a party on whose behalf a final order was issued may seek enforcement in the District Court of a final order issued by the Secretary. PSE&G argues that in light of the Secretary's final order approving the settlement, enforcement of the Agreement "must be sought in the United States District Court." Resp. Answer at 2.

I disagree. Here, the parties voluntarily agreed that the Department of Labor has retained jurisdiction over this settlement agreement. I find that the retention of jurisdiction clause authorizes the Department to hold further administrative proceedings prior to either the Department or a party seeking enforcement in District Court. [2] As I explain below, there is a

genuine dispute whether PSE&G has breached the Agreement and I

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will exercise my retained jurisdiction to resolve that dispute.
The Annuity

PSE&G purportedly purchased an annuity in the amount specified in the Agreement and informed Williams that he would receive a W2 form for that gross amount in early 1995. Feb. 15, 1995 letter from Complainant's counsel to the Secretary ("Comp. Letter"), Exhibit ("Ex.") 3. PSE&G supposedly deducted from the gross amount mandatory withholding of federal income tax, state income tax, and FICA. Comp. Letter, Ex. 7 (Nov. 17, 1994 letter from Richard Quinn of PSE&G to Williams). PSE&G calculated the net amount to purchase the annuity to be approximately 61 percent of the gross amount and informed Williams that "[t]he amount of [his] payments is based on the annuity that could be purchased for the net amount." Comp. Letter, Ex. 7. As a result, Williams receives a monthly payment that is approximately 61 percent of the agreed monthly annuity payment. Notwithstanding the fact that the lower monthly payment reflects the up-front deduction of taxes, the statements accompanying Williams' monthly annuity payments indicate that most of the money paid is taxable income.

It is clear that PSE&G has not paid Williams the agreed amount reflecting an annuity with a survivor benefit. PSE&G argues that it was required by law to make tax and FICA deductions from Williams' annuity. Resp. Answer at 6. I question whether PSE&G was required to make all the deductions up front, if most of the resulting net amount paid is again taxable to Williams. Accordingly, I shall remand to the ALJ to receive evidence regarding the appropriate tax treatment of the annuity and whether PSE&G breached the Agreement. [3] After receipt of the evidence, the ALJ shall issue a recommended decision on the issue.

Attorney's Fees

The Agreement provides in Section 18:

[A]ny breach of any obligation under this Agreement . . . will constitute a breach of this Agreement and will entitle the party to initiate an action in a tribunal of competent jurisdiction. Any party obtaining relief for any breach in any such action shall be entitled to reasonable costs and attorney's fees incurred in such actions.

Williams believed that the amount of back pay PSE&G paid him pursuant to the Agreement, Sec. 4, was short by approximately \$500.00. When PSE&G did not answer inquiries about the shortfall, Williams retained counsel to seek payment.

PSE&G eventually paid the shortfall, more than seven months after Williams' first request for payment. Williams now seeks to invoke Section 18 to obtain payment of the attorney's fee he was charged for obtaining the payment.

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PSE&G's concession that it miscalculated the back pay constitutes a concession that it breached the agreement. Although Williams found it necessary to ask his attorney to help

him obtain payment of the shortfall, he did not have to institute "an action in a tribunal of competent jurisdiction" to do so. See Agreement Sec. 18. The Agreement provides that reasonable costs and attorney's fees are to be paid to "[a]ny party obtaining relief for any breach in any such action." *Id.* Since Williams did not institute such an action to obtain payment of the shortfall, he is not entitled to attorney's fees under Section 18 for that breach of the agreement.

CONCLUSION

This case is REMANDED to the ALJ for further proceedings consistent with this order.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]

A provision of the Agreement requires the parties to keep its terms "in strict confidence." Agreement Sec. 11. Although not required to do so, I will avoid mentioning the financial terms of the Agreement so as to keep them confidential, if possible.

[2]

I note that a Federal District Court may retain jurisdiction over a settlement agreement if the dismissal order shows an intent to retain jurisdiction or incorporates the settlement agreement. *Kokkonen v. Guardian Life Insurance Co.*, 114 S.Ct. 1673 (1994); *Morris v. City of Hobart*, 39 F.3d 1105 (10th Cir. 1994). In this case the Secretary approved a settlement agreement that retains jurisdiction over the settlement in the Department of Labor.

[3]

It is in the ALJ's discretion whether to hold a hearing on the remanded issues or instead to receive sworn, written evidence. If the ALJ finds that a breach has occurred, he shall afford Complainant the opportunity to submit a detailed petition setting forth his costs and any attorney's fees incurred in establishing that there was a breach. See Agreement Sec. 18. In the event such a petition is filed, the ALJ shall afford the opportunity for a response and shall recommend the amount of any such costs and fees to which Williams may be entitled.